No. 02-695

In The
Supreme Court of the United States

MICHAEL FITZGERALD, Treasurer, State of Iowa,

Petitioner,

v.

RACING ASSOCIATION OF CENTRAL IOWA, IOWA GREYHOUND ASSOCIATION, DUBUQUE RACING ASSOCIATION, LTD. and IOWA WEST RACING ASSOCIATION,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Iowa

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

JURISDICTION

Respondents' concession that the Iowa Supreme Court opinion "*in this case* may not have contained" the "magic words" necessary to assert an adequate and independent state ground, Respondents' Brief at 1, disposes of the jurisdictional issue. Nearly twenty years ago this Court took a sensible approach to the resolution of the "vexing" problem of determining whether federal jurisdiction exists over issues decided under similar, and sometimes identical state and federal constitutional provisions. Jurisdictional issues are determined based on the text of the state court opinion "rather than dismissing the case, or requiring that the state court reconsider its decision . . . because of a mere possibility that an adequate and independent state ground supports the judgment. . . . " *Michigan v. Long*, 463 U.S. 1032, 1038, 1044 (1983).[1] Accordingly, this Court will assume "jurisdiction *in the absence* of a plain statement that the decision below rested on an adequate and independent state ground." *Id.* at 1044 (emphasis added).

The argument that the Iowa Supreme Court *could have based* its equal protection decision on an adequate

[1] This proposition was reiterated in several subsequent cases. *See Pennsylvania v. Libran*, 518 U.S. 938, 941 (1996) (stating where "adequacy and independence of any possible state law ground [was] not clear from the face of the opinion," jurisdiction was not precluded); *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (stating opinion contained no "plain statement" the "references to federal law were 'being used only for purposes of guidance, and d[id] not themselves compel the result that [it] reached,' " thus no independent and adequate ground existed to preclude review); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) (stating where opinion contained no "plain statement" the decision rested on state law, no adequate and independent ground existed to preclude review).

and independent state ground and that the Iowa Supreme Court *has done so in the past* misses the point. (Respondents' Brief at 4-5). A state court decision that rests primarily on federal law, or is interwoven with federal law, obligates the state court to make a "plain statement" about any adequate and independent state ground for the decision. Federal law played a sufficient role in the present decision to trigger this obligation.

In this case the Iowa Supreme Court relied on federal precedent at pivotal junctures in the constitutional analysis. Assessing whether the "asserted purpose behind the tax could have been the genuine goal of the legislation," the Court cites to *Nordlinger v. Hahn*, 505 U.S. 1 (1992), and *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975). The Court relied on several Iowa Supreme Court equal protection decisions which, like the present decision, addressed federal constitutional claims and recited the principle that the "same analysis" applies to the federal and state equal protection clauses. *See*, *e.g.*, *Bowers v. Polk Co. Bd. of Supervisors*, 638 N.W.2d 682, 689 (Iowa 2002) ("We therefore apply the same analysis in considering state equal protection claims as we do in considering federal equal protection claims under the Fourteenth Amendment to the Federal Constitution."); *Hearst Corp. v. Iowa Dep't of Revenue & Finance*, 461 N.W.2d 295, 304 (Iowa 1990) ("Section 6 of article 1 of the Iowa Constitution places substantially the same limitations upon the state legislation as does the equal protection clause of the fourteenth amendment."). Significant state court cases from other

jurisdictions on which the Iowa Supreme Court relied,[2] in turn, are decided on federal equal protection principles. *See Volusia County Kennel Club v. Haggard*, 73 So.2d 884 (Fla. 1954). Thus, the Iowa Supreme Court's reliance on the proposition that it applies the "same analysis" when considering federal and state equal protection claims reinforces the conclusion that the Court made no assertion of an adequate and independent state ground for the decision. (Cert. Pet. App. 6).

A statement that the issue arises under both state and federal constitutional provisions and a conclusion that both state and federal constitutional provisions have been violated is not sufficient under this Court's precedent to establish an adequate and independent state ground. *Compare Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990) ("The Superior Court's opinion refers to Art. 1, § 9, of the Pennsylvania Constitution but explains that this provision 'offers a protection against self-incrimination identical to that provided by the Fifth Amendment.' ") *and Commonwealth v. Muniz,* 377 Pa. Super. 382, 386, 547 A.2d 419, 421 (1988) ("Likewise, 'Pennsylvania appellate courts have held that Article I, Section 9 of the Pennsylvania Constitution offers a protection against self incrimination identical to that provided by the Fifth Amendment.' ").[3]

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[2] One state court decision relied upon by the Iowa Supreme Court to support its decision was reversed months later. *Deadwood, Inc. v. North Carolina Dep't of Revenue*, 148 N.C. App. 122, 557 S.E.2d 596 (2001), *rev'd*, *Deadwood, Inc. v. North Carolina Dep't of Revenue*, 356 N.C. 407, 572 S.E.2d 103 (2002).

[3] Additional cases illustrate this point. *See Florida v. Riley*, 488 U.S. 445, 448 n.1 (1989) ("The Florida Supreme Court mentioned the

(Continued on following page)

The Iowa Supreme Court has demonstrated its ability to assert an adequate and independent state ground. *See State v. Cline*, 617 N.W.2d 277, 284-85 (Iowa 2000) ("[W]e strive to be consistent with federal constitutional law in our interpretation of the Iowa Constitution, but we 'jealously guard our right and duty to differ in appropriate cases.' Indeed, the Iowa Constitution is declared to 'be the supreme law of the State . . . ,' and it is the responsibility of this court, not the United States Supreme Court, to say what the Iowa Constitution means. Therefore, our court would abdicate its constitutional role in state government were it to blindly follow federal precedent on an issue of state constitutional law. With this background, we turn now to an examination of the issue under principles of state law.") (citations omitted).

State Constitution in posing the question, once in the course of its opinion, and again in finally concluding that the search violated the Fourth Amendment and the State Constitution. The bulk of the discussion, however, focused exclusively on federal cases dealing with the Fourth Amendment, and there being no indication that the decision 'clearly and expressly . . . is alternatively based on bona fide separate, adequate, and independent grounds,' we have jurisdiction."). *Compare Kentucky v. Stincer,* 482 U.S. 730, 735 n.7 (1987) ("The court gave no indication that respondent's rights under § 11 of the Bill of Rights of the Kentucky Constitution were distinct from, or broader than, respondent's rights under the Sixth Amendment.") *and Stincer v. Commonwealth,* 712 S.W.2d 939, 940 (1986) ("The main purpose of the confrontation rule, under both the Sixth Amendment and Kentucky's Bill of Rights, is to ensure the defendant's right to cross-examine the witnesses against him."); *Compare Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987) ("Rather than containing any 'plain statement' that the decision rests upon adequate and independent state grounds . . . the opinion indicates that the Maryland constitutional provision is construed *in pari materia* with the Fourth Amendment. We therefore have jurisdiction.") *and Garrison v. State*, 303 Md. 385, 391, 494 A.2d 193, 196 (1985) ("Article 26 is *in pari materia* with the Fourth Amendment.").

Likewise, other state courts have crafted a "plain statement" with little difficulty. *See*, *e.g.*, *Commonwealth v. Cass*, 551 Pa. 25, 42, 709 A.2d 350, 358 (1998) (". . . to avoid any doubt that we have rested our decision solidly on Pennsylvania law . . . we developed a four-pronged methodology that we will follow. . . . "); *Hempele v. Pasanen*, 120 N.J. 182, 198-99, 576 A.2d 793, 801 (1990) ("Before embarking on our analysis of the New Jersey Constitution, we emphasize that 'the [f]ederal cases that we cite in support of our interpretation of the New Jersey Constitution are being used only for the purpose of guidance, and do not themselves compel the result that [this Court] has reached.' " (quoting *State v. Bruzzese*, 94 N.J. 210, 217, n.3, 463 A.2d 320, 323 (1983), *cert. denied*, 465 U.S. 1030, 104 S.Ct. 1295, 79 L.Ed.2d 695 (1984)).

Respondents argue "[t]here is no reason to believe that the Iowa Supreme Court's already expressed views on the constitutionality of Iowa Code section 99F.11 under the Iowa Constitution would be altered by a decision of this Court concerning requirements of the U.S. Constitution."[4] (Respondents' Brief at 5). But Respondents misunderstand the significance of the United States Supreme Court's federal jurisdiction in this case. There is no federal jurisdiction if an adequate and independent state ground supports the state court decision. *Michigan v. Long*, 463

[4] The Institute for Justice, as amicus curiae in support of Respondents, appears to agree that no adequate and independent state ground is asserted in the Iowa Supreme Court opinion. The Institute for Justice calls for a remand to the Iowa Supreme Court "to consider this case under state equal protection principles." (Institute for Justice Brief at 21). For reasons discussed, *infra*, a remand for this purpose would be improper.

U.S. at 1039, n.4; *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Harris v. Reed*, 489 U.S. 255, 260 (1989).

By adjudicating the merits of the present case, this Court necessarily determines that there is no adequate and independent state ground for the Iowa Supreme Court decision. Once this federal jurisdictional question is decided, the Iowa Supreme Court cannot reconsider the state court decision in order to subsequently establish an adequate and independent state ground for the decision under the Iowa Constitution.

STATEMENT OF THE CASE

The Respondents' Statement of the Case requires further clarification:

- Racetracks and riverboats are distinct businesses created for different purposes: racetracks were authorized in 1983 to support the horse and dog industries and related agricultural interests; riverboats were authorized six years later in 1989 to generate economic development along the Missouri and Mississippi rivers. Racetracks did not begin operating slot machines until 1994. (J.A. 24, 26, 28). Racetracks, therefore, operated in Iowa for eleven years without any slot machines at all.

- Legislation authorizing the differential tax rate between racetracks and riverboats was introduced as amendment H-5490 to House File 2179 which was sponsored by three legislators, one from Woodbury County, one

from Scott County and one from Polk County. (Plaintiffs Statement of Undisputed Material Facts: Exhibit 5). Riverboats are located in Woodbury County and Scott County; a racetrack, but no riverboat, is located in Polk County. (J.A. 27-28, 33). The differential tax rate, therefore, was sponsored by legislators from both riverboat and racetrack communities.

- The maximum differential tax rate of 36 percent on adjusted gross revenue from slot machines at racetracks is comparable to tax rates on gaming revenue in Colorado, Illinois and New Mexico. *See* Division C, *infra*.

- Slot machines have dramatically increased revenue at the three racetracks located in Iowa – regardless of the applicable tax rate. By 1999, five years after the racetracks began operating slot machines, the slot machines at the three racetracks produced nearly $5 billion in annual revenue. (J.A. 120-22). Applying the maximum tax rate of 36 percent to prior tax years, the two largest racetracks each would have been left with no less than $65 million and as much as $96 million per year for operating expenses and distributions to charities and local governments. *See* Division C, *infra*.

ARGUMENT

THE STATE OF IOWA DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BY TAXING THE REVENUE FROM SLOT MACHINES AT RACETRACKS AT A DIFFERENT RATE THAN IT TAXES THE REVENUE FROM ALL CASINO GAMES (INCLUDING SLOT MACHINES) ON RIVERBOATS.

Rather than engage in rational speculation to *uphold* the tax classifications, Respondents, and a narrow majority of the Iowa Supreme Court, instead speculated to find a single reason for the legislation to be deemed irrational. Respondents further confuse the equal protection analysis by asserting that multiple statutes passed in one bill have only one legislative purpose and that affidavits from five Iowa legislators are tantamount to codification of this purpose as the sole legitimate state interest. (Respondents' Brief at 22-29). From these premises, Respondents assert that rational speculation on any additional legitimate state interests that might support the differential tax rate is precluded.

Respondents' premises underlying this argument are flawed. First, the argument assumes there can be only one legitimate state interest in support of three separate statutes – the same analytic mistake that led the Iowa Supreme Court to an erroneous conclusion. Second, the argument assumes that legitimate state interests are subject to evidentiary proof by legislative affidavits – a premise directly at odds with the precedent of this Court.

On these shaky grounds, Respondents contend the racetracks suffer tax discrimination that is "unprecedented in its magnitude" – the consequences of which "would have driven one of the three racetracks out of

business and curtailed the other two racetracks' ability to make governmental and charitable contributions." (Respondents' Brief at 42). Respondents' arguments unravel under close examination.

A. The Authorization of Slot Machines at the Racetracks and the Differential Tax Rate Have Different Legislative Purposes.

Respondents draw erroneous conclusions from the fact that the authorization of slot machines at racetracks, the elimination of wager and loss limits on riverboats, and the differential tax rate were passed in a single piece of legislation in 1994. Although these three provisions were passed by the Iowa General Assembly in one bill, *see* 1994 Iowa Acts, ch. 1021, §§ 13, 19, 25, the bill included numerous changes in the law. These changes in the law had different legislative purposes. *See generally United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 181 (1981) (A single statute enacted in one bill may be the "product of multiple and somewhat inconsistent purposes that led to certain compromises.").

In Iowa one bill may contain references to numerous statutes on a single subject, so long as all of the statutes are embraced by the title. Iowa Const. art. III, § 29. The title of the 1994 bill was broadly stated as an act:

> relating to gambling and the regulation of gambling at pari-mutuel racetracks and on excursion gambling boats, providing for a county referendum, imposing a tax, allocating gaming revenues, proving an effective date, providing for other properly related matters, and subjecting violators to existing penalties. [1994 Iowa Acts, ch. 1021.]

This bill included thirty-one sections affecting four different chapters and fifteen different statutes in the Iowa Code. Not every section in this broad bill was for the sole and exclusive purpose of helping "the racetracks recover from economic distress." (Respondents' Brief at 21). For example, some sections in this bill raised the age for wagering from eighteen to twenty-one, 1994 Iowa Acts, ch. 1021, § 27, prohibited licensees from accepting credit cards to purchase coins or tokens for wagering, *id.* at § 24, and set a minimum passenger capacity for the riverboats, *id.* at § 14. The differential tax rate, like these diverse sections in the bill, had a legislative purpose separate and apart from helping the racetracks financially.

Authorization of slot machines at the racetracks in one section of the 1994 bill did not preclude the differential tax rate in another section of the same bill from serving legitimate state interests properly found through rational speculation. Simply put, the Iowa Legislature could have rationally concluded *both* that slot machine revenue would help the racetracks financially (even if heavily taxed) *and* that a lower tax rate for the riverboats would further legitimate state interests.

B. Legislative Affidavits Do Not Preclude Rational Speculation About Legitimate State Interests Which Are Furthered by the Differential Tax.

Respondents cast the Iowa Supreme Court's decision as an "Allegheny-type of case" in which the state interest to "help the racetracks recover from economic distress" has been conclusively proven by affidavits from five Iowa legislators. This "undisputed evidence," Respondents contend, established the only legitimate state interest against which the reasonableness of the differential tax

must be judged.[5] (Respondents' Brief at 21). Rational speculation cannot be so easily discarded.

The Respondents' theory is not supported by the Iowa Supreme Court's decision in this case. The Court never refers to the affidavits of the five Iowa legislators and never cites to the *Allegheny* decision as authority for its conclusion. Rather, the Court simply concludes – without distinguishing among the numerous sections of the 1994 bill, without rational speculation and without any further explanation – that the 1994 legislation was "designed to help the racetracks recover from financial distress."[6] (Cert. Pet. App. 10).

In this case the affidavits of five Iowa legislators are not tantamount to codification of a legitimate state interest. In contrast to the case at hand, *Allegheny* presented the rare circumstance in which the state's interest had been codified in the state constitution. *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336, 338 (1989). *See also Minnesota v. Cloverleaf Creamery Co. et al.*, 449 U.S. 456, 462-63 (1981) (legitimate state interests codified in state statute).

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[5] Respondents seemingly contend that the legislative affidavits establish a factual background that renders other legislative goals wholly irrational which, in turn, precludes rational speculation, Respondents' Brief at 20, *and* contend that the affidavits are tantamount to codification of one legitimate state interest, Respondents' Brief at 21. Both theories would restrict the State to a single state interest, *i.e.*, to help the tracks financially. Both theories are wrong.

[6] Earlier in the opinion the Iowa Supreme Court states that "the 1994 legislation was designed to save the racetracks *and riverboats* from financial distress." (Cert. App. 3 (emphasis added)).

Respondents' characterization of the affidavits as "historical recitations of events by major participants in those events" is not consistent with the purpose Respondents now assert. (Respondents' Brief at 25). Respondents claim the affidavits, which use strikingly similar language to relate discussion among a handful of legislators about the differential tax rate, establish "helping the racetracks recover from economic distress" as the only legitimate state interest. (Plaintiffs' Statement of Undisputed Material Facts: Exhibits 6-9). Three of these affidavits go so far as to state that "no reasons" were offered "for taxing racetracks at a higher rate than riverboats." (Plaintiffs' Statement of Undisputed Material Facts: Exhibits 7-9).

These affidavits were admitted by the Iowa district court only as "factual background," not as evidentiary proof of a legitimate state interest. (J.A. 24-25). Indeed, the district court applied rational speculation after concluding the State is not required "to produce evidence to sustain the rationality of a statutory classification." In doing so, the district court upheld the differential tax rate as furthering legitimate state interests in promoting development of river towns, preserving Iowa's riverboat history, or encouraging a useful industry. (J.A. 32).

Respondents emphasize that the affidavits are "unrebutted." (Respondents' Brief at 24). These affidavits were admitted over Petitioner's objection. (Cert. Pet. App. 24). Because Petitioner prevailed in the district court and the district court did not rely on the affidavits to limit rational speculation about legitimate state interests, the Petitioner did not cross-appeal. (Cert. Pet. App. 24-25). To have "rebutted" the legislative affidavits in the district court by offering *contrary statements* from among the remaining

145 state legislators would have turned rational speculation into an evidentiary trial.

Admission of the affidavits as "factual background" in the Iowa district court should not now be considered conclusive evidence on the question whether the differential tax rate furthers a legitimate state interest. Iowa does not maintain records of legislative debate and has no formal legislative history. *See generally Emery v. Fenton*, 266 N.W.2d 6, 8 (Iowa 1978). Nevertheless, the Iowa Supreme Court "will not consider a legislator's own interpretation of the language *or purpose of a statute*, even if that legislator was instrumental in drafting and enacting the statute in question." *Ruthven Consol. School Dist. v. Emmetsburg Community School Dist.*, 382 N.W.2d 136, 140 (Iowa 1986) (emphasis added). The Court has explained:

> At first blush it might seem reasonable to rely upon an individual legislator's opinion of legislative intent. But we believe such testimony is generally unpersuasive. The legislative process is a complex one. A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. *What impelled another legislator to vote for the wording is apt to be unfathomable*. Accordingly we are usually unwilling to rely upon the interpretations of individual legislators for statutory meaning.

Iowa State Ed. Association-Iowa Higher Ed. Ass'n v. Public Employment Relations Bd., 269 N.W.2d 446, 448 (Iowa 1978) (emphasis added).

The affidavits of state legislators should not used to limit rational speculation by turning this into an evidentiary issue, a proposition which this Court has repeatedly rejected. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). *Cf. Minnesota v. Cloverleaf Creamery Co. et al.*, 449 U.S. at 464. Thus, whether or not any legislator offered a reason for the differential tax rate "has no significance in rational-basis analysis." *See id.* at 315.

C. The Differential Tax Rate Is Not Disproportionate to Tax Rates in Other States and Does Not Frustrate the Racetracks' Contribution to the Economy.

Respondents characterize the maximum differential tax rate of 36 percent at issue in this case as "unprecedented in its magnitude."[7] (Respondents' Brief at 42). While precise comparisons are difficult because Iowa offers a wider variety of gambling than other States,[8] the Iowa

[7] The tax rate on slot machine revenue is actually *lower* than the sales tax rate paid by Iowa residents. The wagering tax is paid only on adjusted gross revenues which are approximately ten percent of the gross revenue received by the racetracks. (*See* Petitioner's Brief at 4-5, n.1). The wagering tax would be 3.6 percent if imposed on gross revenue. Most Iowa residents, by contrast, pay 5 percent in sales tax. Iowa Code § 422.43 (2003).

[8] Iowa offers parimutuel wagering, both live and simulcast, casino riverboat gambling, Class III Indian Gaming, a state lottery and social

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wagering tax rates cannot be called "unprecedented" in "magnitude" when compared to tax rates in other state jurisdictions. For example, Colorado caps the maximum tax rate on adjusted gross receipts from gaming at 40 percent and delegates to the Colorado Gaming Control Commission authority to set the tax rate annually at, or below, this cap.[9] *See* Colo. Rev. Stat. § 12-47.1-601 (2003) *and* Colo. Const. art. XVIII, § 9. Illinois has enacted escalating tax rates which, until July 1, 2002, had a maximum rate of 35 percent on adjusted gross receipts in excess of $100 million. From July 1, 2002, the maximum tax rate on adjusted gross receipts in excess of $100 million went up to 37.5 percent and hit 45 percent on adjusted gross receipts in excess of $150 million and 50 percent on adjusted gross receipts in excess of $200 million. 230 Ill. Comp. Stat. 10/13 (2003). New Mexico imposes a "gaming tax" of 25 percent of the "net take" of a gaming operator licensee,[10] but a gaming operator licensee who is a racetrack must pay an additional 20 percent of the "net take" for purses to be distributed under the rules of the State Racing Commission. N.M. Stat. Ann. § 60-2E-47 (2002). Racetracks in New Mexico, therefore, must pay

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and charitable gambling. *See* Iowa Code §§ 10A.104(10), 99B.3, 99B.5, 99B.6, 99B.7, 99D.4, 99D.11, 99E.3, 99F.3 (2003).

[9] Currently the Colorado Gaming Control Commission sets the tax at 20 percent on annual adjusted gross revenues over $15 million, but *could* raise the tax as high as 40 percent. 1 Colo. Code Regs. § 47.1-1401.

[10] Contrary to Respondents' assertion, New Mexico *does not* tax all gaming licensees uniformly. (Respondents' Brief at 7). Nonprofit organizations pay 10 percent of the "net take" while "every other gaming operator licensee" pays 25 percent of the "net take." N.M. Stat. Ann. § 60-2E-47 (2002).

out a total of 45 percent of their "net take." Iowa, by contrast, sets a tax rate higher than 25 percent on adjusted gross revenue, but does not specify by statute the percentage that must be paid out in purses. Thus, the Iowa tax rate cannot be characterized fairly as "unprecedented in magnitude."

The Respondents argue further that the tax on the racetracks is "confiscatory," "draconian," "undermines the legislature's actual purpose" of saving the racetracks and is "incapacitating." (Respondents' Brief at 14-15, 33, 36, 42). These assertions would be relevant to the resolution of this case only if helping the racetracks financially were the sole legitimate state interest in issue. Further, even if such assertions were relevant, the assertions are inaccurate.

There is very little evidence in this record on the financial condition of the racetracks, because under any proper theory of equal protection this evidence is not relevant. (Petitioner's Brief at 32-34). But the financial information from the racetracks themselves demonstrates that the two largest racetracks have been assisted enormously by the slot machines and make discretionary expenditures of tens of millions of dollars each year.

The two largest racetracks – Prairie Meadows and Bluffs Run – are dominate.[11] If Prairie Meadows had been

[11] In 1999, gross receipts at the two largest racetracks accounted for 89 percent of the industry business. (J.A. 112-27, 138-48). The Dubuque racetrack accounted for only 11 percent. Little additional financial information about the Dubuque racetrack is available in the record. (J.A. 129, 131). But nothing in the record supports Respondents'

(Continued on following page)

taxed at the rate of 36 percent from 1997-1999, it would have had in these years the following amounts to pay ordinary expenses and to fund discretionary public policy expenditures, *i.e.*, racing purse supplements, payments to Polk County and charitable contributions:[12]

1997 – $82,339,926

1998 – $83,828,564

1999 – $96,480,349

For the years 1995-1999, Prairie Meadows made at least the following in public policy expenditures:

Payment to Polk County	–	$186,000,000
Contributions to charities	–	$ 12,000,000
Horse purse supplements	–	$ 26,000,000
		$224,000,000

If Prairie Meadows were taxed at 36 percent during these years, it still could have made substantial expenditures:

	$224,000,000
Less additional tax at 36%	- $ 87,052,857[13]
Expenditures that would have been made under a 36% tax	$136,947,143

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suggestion that the tax rate, alone, will force the Dubuque racetrack to close. (*See* Petitioner's Brief at 9).

[12] All of the following financial information is drawn from Respondents' affidavits. (J.A. 112-27, 138-48). Tax calculations are based on application of Iowa Code § 99F.11 to adjusted gross revenue as stated in the affidavits.

[13] For the years 1995 and 1996, the calculations assume the adjusted gross revenues were equal to 1997.

Focusing on a single year may give a clearer picture. In 1997, Prairie Meadows made combined Polk County payments and charitable contributions of $52,200,000. If Prairie Meadows paid the full 36 percent tax that year, the additional payment would have been $17,830,260. Prairie Meadows would still have had $34,000,000 for discretionary public policy payments. This racetrack was saved by the 1994 legislation.

A similar situation exists at Bluffs Run. If Bluffs Run had been taxed at the 36 percent rate from 1997-1999, it still would have had the following amounts to pay ordinary expenses and to spend on discretionary public policy expenditures:

1997 – $65,969,335

1998 – $70,295,557

1999 – $73,506,326

However, probably the best indicator of the financial condition and future of Bluffs Run is the acquisition in 1999 of Bluffs Run by a very sophisticated buyer, the Las Vegas casino company Harvey's, who was on notice that the tax rate was scheduled to go to 36 percent in 2004. (J.A. 145). Another racetrack has been saved by the 1994 legislation.

Accordingly, the figures demonstrate that the Iowa Legislature managed to help the racetracks financially while expressing a tax preference for riverboats.

CONCLUSION

In 1994 the Iowa legislature authorized slot machines at racetracks to save the racetracks from economic distress – a bold move that succeeded. This bold move did not subsume other important legislative goals. Additional portions of the same legislation established a differential tax rate on revenue from gambling games at racetracks and on revenue from gambling games on riverboats.

Applying equal protection analysis, the Iowa Supreme Court should have engaged in rational speculation about legitimate state interests that are furthered by the differential tax rates. Only if the tax classifications are based on legislative facts *which could not reasonably be conceived to be true*, should the tax classifications have been overturned. A tax preference for riverboats furthers numerous legitimate state interests, including promoting development of river communities, promoting riverboat history, promoting riverboat casinos as a useful industry, preventing riverboats from leaving Iowa, compensating riverboats for high operating expenses, protecting expectations of existing riverboats and attracting new riverboats.

For all of the foregoing reasons, the judgment of the Iowa Supreme Court should be reversed.

Respectfully submitted,

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